Supreme Court, U.S.
FILED
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No. 00-

IN THE

Supreme Court of the United States

RODNEY H. KEITH, as representative Plaintiff for CLANCY WAYNE KEITH and SHIRLEY H. KEITH,

Petitioners,

v.

JAMES T. RIZZUTO, Executive Director, Colorado Department of Health Care Policy and Financing,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Tenth Circuit err in ruling that statutory exceptions to statutory requirements in the Social Security Act are optional for states participating in the Medicaid program?

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(D. Colo. Nov. 23, 1999)

BASIS FOR JURISDICTION

(i) The date of the Judgment of the Tenth Circuit Court of Appeals is May 15, 2000.

(ii) The date of the Order of the Tenth Circuit Court of Appeals denying Rehearing is June 20, 2000.

(iii) This provision of U.S. Sup. Ct. R. 14(1) is not applicable.

(iv) 42 U.S.C. § 1254(1) confers jurisdiction on this Court to review the judgment in question.

(v) This provision of U.S. Sup. Ct. R. 14(1) is not applicable.

STATUTES INVOLVED

42 U.S.C. § 1396p

42 U.S.C. § 1396r-5(c)

42 U.S.C. § 1396r-5(d)

Colo. Rev. Stat. § 14-6-110

Colo. Rev. Stat. § 15-14-409.7

Colo. Rev. Stat. § 38-10-111.5

Pursuant to U.S. Sup. Ct. R. 14(1)(f), these statutes are reproduced verbatim in the appendix.

STATEMENT OF THE CASE

A. Statement of Facts

Clancy Wayne Keith resided at Community Care of America at LaVilla Grande, in Grand Junction, Colorado (Aplt. App. at 7), until his death on July 12, 2000. From the inception of this action, until his death, he suffered from dementia and required total care in a controlled environment. Aplt. App. At 10. His medical needs were of sufficient severity that he met the medical necessity guidelines of the Colorado Medicaid Program. *Id.* He was married to the Petitioner, Shirley H. Keith. Aplt. App. at 7. Mr. and Mrs. Keith were supported by his income alone, which consisted of a civil service pension of $4,800 monthly ($3,868.73 net) and a pension from the Veteran's Administration in the amount of $67 a month. As of April 15, 1998, the Keiths' total savings amounted to approximately $66,000. Aplt. App. at 10. Unfortunately, these financial resources were insufficient to allow Mr. and Mrs. Keith to pay for both the medical care Mr. Keith needed, as well as for Mrs. Keith's living expenses. Aplt. App. at 12.

On April 28, 1999, Mr. Keith executed a valid income trust into which his entire pension was deposited each month. Aplt. App. at 11. An income trust is defined by federal law as a trust established in certain states, including Colorado, that consists only of certain unearned income of the settlor. Federal law also requires that, upon the individual's death, the state Medicaid program receive all of the funds left in the trust up to the total amount of medical assistance paid on behalf of the individual. 42 U.S.C. § 1396p(d)(4)(B). These trusts are Congressionally authorized in order to establish Medicaid eligibility for persons whose income exceeds a certain income limit. *See also* Colo. Rev. Stat. § 15-14-409.7(1).

On April 15, 1999, Mr. Keith applied for Medicaid benefits from the Mesa County Department of Social Services. Mr. Keith's application was denied based on a Colorado statute which limited the use of income trusts to those individuals whose income is less than the average private pay rate for nursing home care in the geographic region of the state in which he or she resides. Colo. Rev. Stat. § 15-14-409.7(3)(f). Aplt. App. at 11. This requirement does not exist under federal law. It is the implementation of this requirement which this action challenged in the lower courts.

But for this requirement, Mr. Keith would have been granted Medicaid benefits, and his medical needs would have been fully covered by a combination of his own income and Medicaid. Moreover, Mrs. Keith would have been entitled to a monthly income payment out of her husband's civil service pension, and she would have been able to utilize her savings for her support. *See* 42 U.S.C. §§ 1396r-5(d)(1)(B) (income); § 1396r-5(c)(2)(B) (resources). She would have then had sufficient financial resources to survive on her own without depleting her and her husband's life savings.

Mr. and Mrs. Keith's action challenging the state imposed limitation on income trusts was dismissed by the District Court, pursuant to F.R.C.P. 12(b)(6). Appendix, pp. 8a-11a. The Tenth Circuit affirmed the District Court, finding that, despite the provisions of 42 U.S.C. § 1396p(d)(4)(B) which indicate that states "shall" comply with its provisions, states had the option, ". . . to decide whether or under what conditions to recognize such trusts." Appendix, p. 7a.

B. Basis for Federal Jurisdiction in the Court of First Instance

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 in that this action arises under a law of the United States.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case under the provisions of U.S. Sup. Ct. R. 10(c) for two reasons. First, the Tenth Circuit has erroneously decided an important question of federal law that has not been previously addressed by this Court. This question concerns the manner in which 42 U.S.C. § 1396p(d)(4) should be interpreted by the states in their administration of the Medicaid program. Already, since the Tenth Circuit has rendered its decision, there have been two federal district court cases relying on the holding in this case, *Steenrod v. Rizzuto,* No. 99-WM-1824 (D. Colo. August 25, 2000); *Habib, et al. v. Rizzuto,* No. 96-WM-1537 (D. Colo. August 24, 2000), as well as one decision of the Colorado Court of Appeals. *Colorado Dept. of Health Care Policy and Financing v. Estate of Roberts,* No. 99-CA-1066, August 3, 2000. All three decisions uphold state statutes which add additional unauthorized Medicaid eligibility requirements.

Secondly, the Tenth Circuit decided the question in a manner that conflicts with prior relevant decisions of this Court. This Court has long held that, when construing the Social Security Act, a state cannot deny benefits to persons entitled under the Act, absent a *clear* indication that Congress intended that particular coverage to be optional. *See, e.g., Philbrook v. Glodgett,* 421 U.S. 707, 719 (1975); *Townsend v. Swank,* 404 U.S. 282, 287 (1971). In contrast, the Tenth Circuit decided that, despite the fact that the Petitioner clearly complied with the requirements of § 1396p(d)(4)(B) in applying for Medicaid eligibility, the Respondent could rely on a Colorado statute which added an eligibility requirement not authorized by federal law, and deny his application for benefits. The Tenth Circuit did this by employing logic unprecedented in the law. Without citation to any legal authority, the Tenth Circuit held that when Congress establishes requirements of state Medicaid programs, and then delineates specific exceptions to those requirements, states are free to ignore the exceptions to the federal law. The following quotes from the Opinion illustrate the rationale of the Tenth Circuit:

> Section 1396p(d)(3) does not merely "allow" states to count trusts in determining Medicaid eligibility; it *requires* them to do so. Section 1396p(d)(4) therefore provides an exception to a requirement. *States accordingly need not count income trusts for eligibility purposes, but nevertheless may, like Colorado, opt to do so.*

Appendix, pp. 5a-6a (First emphasis in original; second emphasis added).

> Congress required that states generally count trust assets and income for purposes of determining Medicaid eligibility, *but exempted income trusts from that requirement. Thus, Congress left the states free to decide whether and under what conditions to recognize such trusts.*

Appendix, p. 7a.

The result of the Tenth Circuit's holding is to create a dangerous precedent which will adversely affect the interrelationship between state and federal law in the Medicaid program, and other federal programs administered by the states. Certiorari should be granted in order to establish as United States Supreme Court precedent that federal statutory exceptions to federal requirements are to be interpreted as mandatory, unless an option is clearly granted to the states by Congress. This is especially critical where, as is the case here, the additional state requirements exist under the guise of state property law, as opposed to a more overt attempt by the state to overrule federal Medicaid law. *See, e.g.*, Colo. Rev. Stat. § 38-10-111.5.

I.

THE TENTH CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW.

Title XIX of the Social Security Act was added in 1965 when Congress created the Medicaid program. The purpose of the program is to provide federal financial assistance to states that choose to pay for certain types of medical treatment for needy individuals. Participation in the Medicaid program is entirely optional, but once a state elects to

do so, the state must comply with the requirements of Title XIX. *Harris v. McRae*, 448 U.S. 297, 301 (1980). Colorado participates in the Medicaid program by virtue of its passage of the Colorado Medical Assistance Act. Colo. Rev. Stat. § 26-4-101, *et seq.* Though certain coverages are mandatory [42 U.S.C. § 1396a(a)(10)(A)(i)], other coverages are optional. One of these optional coverages provides assistance to certain persons in medical institutions, who meet certain financial asset requirements, and "whose income does not exceed a separate income standard established by the State which is [not more than three times the benefit rate established for the Supplemental Security Income program (SSI)]." 42 U.S.C. § 1396a(a)(10)(A)(ii)(V). Colorado has elected to cover this optional group by virtue of its passage of Colo. Rev. Stat. § 26-4-301(1)(g). This limitation on income for Medicaid eligibility purposes is frequently referred to as an "income cap".

The income cap on Medicaid eligibility had a harsh effect. In Colorado, persons did not have enough income to pay for the cost of their care in nursing homes, but yet, were rendered ineligible for Medicaid by virtue of this income cap. *See* Colo. Rev. Stat. § 15-14-409.5(1)(b). *See also* Ira Stuart Wiesner, *OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context,* 19 Nova L. Rev. 679, 722 (1995). Thus, in 1993, Congress passed the statute on which Petitioners rely, i.e., 42 U.S.C. § 1396p(d)(4)(B). The intent of the statute was specifically to eliminate the effect of the income cap for nursing home residents. *L.M. v. State Div. Of Med. Assistance,* 659 A.2d 450, 454 (N.J. 1995); Weisner, *supra,* 19 Nova L. Rev. at 723, 730, n.201.

42 U.S.C. § 1396p(d) constitutes Congress' attempt to address all issues surrounding trusts created and funded by the Medicaid applicant or his or her spouse. Section 1396p(d)(3) contains the general rule, which can be summed up by stating that if a trust is created and funded by the applicant or their spouse, the trust will be counted for Medicaid eligibility purposes, to the extent distributions can be made on behalf of the applicant, regardless of any restrictions imposed by the trust on such distributions for the individual. Section 1396p(d)(4)(B) is an exception to this general rule, and states:

> This subsection *shall not apply* to any of the following trusts:
>
> (B) A trust established in a State for the benefit of an individual if-
>
> (i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),
>
> (ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter, and
>
> (iii) the State makes medical assistance available to individuals [utilizing the income cap methodology described above].

(Emphasis supplied).

Clearly, the statute provides that once Colorado has elected to provide Medicaid to persons similarly situated to Mr. Keith, it must not apply the rules in § 1396p(d)(3) to income trusts complying with the federal statute created by such persons. This is the case because of the use of the mandatory terms "shall not apply" in § 1396p(d)(4)(B). Despite this clear statutory language, the Tenth Circuit found that states had discretion as to how to treat income trusts, merely because the portion of the statute authorizing income trusts exists as an exception to the mandatory language contained in § 1396p(d)(3). App. at 5a-7a. It allowed the Respondent to continue to enforce Colo. Rev. Stat. §§ 15-14-409.7(3)(f); 38-10-111.5, so as to impose a new income cap on the utilization of income trusts. Curiously, the Court recognized the importance of Congress' use of the word "shall" in § 1396p(d)(3), but ignored the presence of the very same mandatory language in construing § 1396p(d)(4)(B). App. at 5a-7a. As a result, as was noted above, already three different court decisions have been handed down upholding other state imposed restrictions on the scope of § 1396p(d)(4), even though those restrictions are not authorized by the federal statute.

Although the Tenth Circuit addressed the Petitioners' arguments concerning conflict pre-emption (App. at 6a-7a), it did not address Petitioners' arguments concerning other types of pre-emption established by this Court. Given Congress' utilization of the mandatory words "shall not apply", it was error for the Tenth Circuit to fail to address the issues of express and implied pre-emption.

In a case interpreting the Occupational Safety and Health Act of 1970 (OSHA), this Court held that an Illinois law was impliedly pre-empted by a provision of OSHA because

it contained a directive utilizing the word "shall." "The principal indication that Congress intended to pre-empt state law is [the statute's] statement that a State 'shall' submit a plan if it wishes [to opt out of the federal requirement]." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 99 (1992). Indeed, in that case, Justice Kennedy wrote a concurring opinion in which he found that Congressional use of the word "shall" constituted express pre-emption of state law.

> Though most statutes creating express pre-emption contain an express statement to that effect, a statement admittedly lacking in [the provision of OSHA at issue], we have never required any particular magic words in our express pre-emption cases. Our task in all pre-emption cases is to enforce the "clear and manifest purpose of Congress." [citation omitted]. We have held, in express pre-emption cases, that Congress' intent must be divined from the language, structure, and purposes of the statute as a whole.

Id. at 112, Kennedy J., concurring. *See also Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

Thus, the Tenth Circuit's determination that § 1396p(d)(4) is optional with the states because of its existence as an exception to the mandatory language of § 1396p(d)(3) is incorrect because it ignores the mandatory language in § 1396p(d)(4). This analysis becomes even more persuasive when one notes that the effect of the Tenth Circuit's decision is to ratify a state imposed income cap on the utilization of income trusts. Given the fact that Congress

expressly imposed an income cap in one portion of the statute [42 U.S.C. § 1396a(a)(10)(A)(ii)(V)], and failed to impose an income cap on the utilization of income trusts, it is clear that Congress did not intend to allow such a cap. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. [citations omitted]" *Bates v. United States,* 522 U.S. 23, 29-30 (1997).

In *Bates*, this Court found that Congressional inclusion of language regarding a criminal penalty for acts committed with an intent to defraud the United States in the destruction of records relating to the Guaranteed Student Loan program (GSL), coupled with its failure to include such language with respect to criminal penalties for the misapplication of GSL loan proceeds, indicated that an intent to defraud the United States was not required by Congress in the latter instance. *Id.* at 291. Similarly here, there is no income cap language associated with the income trust statute, and therefore, adoption of an income cap by a state Medicaid program is contrary to Congressional intent.

The only case of which counsel is aware which construes 42 U.S.C. § 1396p(d)(4) directly is *Matter of Moretti*, 606 N.Y.S.2d 543 (N.Y. Sup. Ct. 1993). In that case, the Court considered various New York state laws which restricted the utilization of trusts for persons who were recipients of various government benefits. Since the state laws were more restrictive than the provisions of 42 U.S.C. § 1396p(d)(4)(A), the Court ruled that they were not binding.

> To the extent that these provisions or any other State statutes or regulations may be construed as being inconsistent with, more restrictive than, or in contravention of the spirit of [42 U.S.C. §1396p(d)(4)], they are not binding on this court since any such inconsistency would be violative of the supremacy clause of the United States Constitution.

Moretti, supra, 606 N.Y.S.2d at 547-8.

The *Moretti* Court did not find that the provisions of the statute were optional with the states. This is the exact same analysis which should have been performed by the Tenth Circuit in this case.

II.

THE TENTH CIRCUIT'S RULING CONFLICTS WITH PRIOR RELEVANT DECISIONS OF THIS COURT.

It has long been axiomatic that a state's Medicaid program must comply with the ". . . requirements imposed both by the [Social Security] Act itself and by the Secretary of Health and Human Services." *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-7 (1981). *See also Harris, supra,* 448 U.S. at 301. This requirement arises out of the Act's scheme of "cooperative federalism," in which the Federal government pays a percentage of the amount expended by the state under the Medicaid program, in exchange for which, the state agrees to comply with the Social Security Act's requirements for the Medicaid program. *Id.* at 308. *Cf., King v. Smith*, 392 U.S. 309, 316 (1968) [The former Aid to Families with Dependent Children program (AFDC) under the

Social Security Act is ". . . a scheme of cooperative federalism. . . ."] Such an exercise of authority by Congress is an appropriate application of Congress' spending power. "Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." *New York v. United States,* 505 U.S. 144, 167 (1992) (holding that portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 are not inconsistent with the Tenth Amendment. *Id.* at 173-4.) Thus, the Colorado statutes at issue are unenforceable because Colorado has accepted federal Medicaid funds. The question then remains: What form of analysis should be used to interpret the mandate of § 1396p(d)(4), insofar as it says that the provisions of § 1396p(d)(3) "shall not apply" to income trusts such as the one at issue in this case? The Tenth Circuit answered this question by stating that, since the former statute operates as a series of exceptions to the latter, the provisions of § 1396p(d)(4) are optional with the states. Appendix, pp. 5a-7a. Such an analysis directly contradicts this Court's holding in several similar cases construing the AFDC provisions of the Social Security Act.

In *Philbrook v. Glodgett,* 421 U.S. 707 (1975), this Court construed an AFDC provision of the Social Security Act insofar as it conflicted with a Vermont regulation concerning the payment of benefits to families where one of the parents is receiving unemployment compensation. *Id.* at 711-713. In holding the Vermont regulation unenforceable, this Court ruled as follows:

> . . . it is apparent that the Vermont definition of "unemployed father," which has been applied to exclude unemployed fathers who are eligible for

> unemployment compensation, conflicts with [the Social Security Act]. Vermont "may not deny aid to persons who come within [the purview of the Act] *in the absence of a clear indication that Congress meant the coverage to be optional.*"

Id. at 719 (citations omitted) (emphasis supplied).

A similar analysis was utilized by this Court in *Townsend v. Swank,* 404 U.S. 282 (1971). In that case, an Illinois statute which restricted AFDC benefits to certain families in a manner not allowed under the Social Security Act was invalidated. *Id.* at 285. In so ruling, this Court stated as follows:

> Thus, King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion *clearly evidenced* from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance, under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

Id. at 286. (Emphasis supplied).

Thus, in the past, this Court has invalidated state eligibility standards that vary from the standard set by Congress, unless supported by some *clear* language in the Social Security Act or its legislative history (though these cases deal with the AFDC program, their analysis is applicable to the Medicaid program since the *Harris* case cited *King*, an AFDC case, as support for its holding that acceptance of federal financial assistance obligates the states

to comply with the Social Security Act. *Harris, supra*, 448 U.S. at 308). In contrast, in this case, the Tenth Circuit upheld a state eligibility standard that varied from the standard set by Congress without any real indication that such a variance was in accordance with Congressional intent.

Another factor which this Court has found to be relevant to the issue of whether Congress wanted a particular coverage under the Social Security Act to be optional, is the presence or absence of statutory language allowing the states an option with regard to coverage under the program. For example, in the *Townsend* case, the Social Security Act provided that children eligible for benefits under the AFDC program included children under 21 who were attending a college, university, or a vocational or technical training school. However, the Illinois statute limited AFDC benefits to children attending high school or a vocational training school. *Townsend, supra,* 404 U.S. at 283-5. In response to an argument from the state agency administering the program that the statute authorized the state to vary eligibility requirements, the Court noted that Congress granted the states some discretion with respect to the determination as to whether the child satisfied the requirement of the Act that the child be "regularly attending" school. It further stated that, given that this was the only area in which the state was granted such discretion, it had *no* discretion with respect to the remaining portion of the Act. "This particularization of the area of state authority is itself cogent evidence that Congress did not also authorize the States to limit eligibility to students attending vocational school." *Id.* at 287.

In this case, it is notable that 42 U.S.C. § 1396p as a whole contains six different locations where Congress has explicitly granted the states an option with regard to the

Medicaid program. 42 U.S.C. §§ 1396p(b)(1)(B)(ii); (b)(4)(B); (c)(1)(A); (c)(1)(C)(ii); (c)(1)(E)(i)(II); (c)(1)(E)(ii)(II). Yet, no such option exists with respect to § 1396p(d)(4). This is, as previously noted by this Court in *Townsend*, cogent evidence that Congress did not intend the provisions of the latter statute to be optional. Thus, the Tenth Circuit's analysis is erroneous, and fails to follow the prior decisions of this Court. Unless that analysis is addressed and reversed by this Court, the Tenth Circuit's decision will undoubtedly be used as precedent in the area of programs cooperatively funded by the state and federal governments.

III.

THE ISSUE OF MOOTNESS.

With respect to the claims advanced by Mrs. Keith, Petitioners' case is not rendered moot by virtue of her husband's death. Mootness occurs when the controversy between the parties ". . . no longer touch[es] the legal relations of parties having adverse legal interests." This occurs because Article III of the U.S. Constitution limits the power of the judiciary to those cases in which a "case or controversy" exists. *Defunis v. Odegaard,* 416 U.S. 312, 316 (1974) (quoting *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-241 (1937)). The general rule is that the requirement of an actual controversy must be satisfied, not only at the date the action is initiated, but also at the time of appellate review. *Defunis, supra*, 416 U.S. at 319.

Clearly, the death of Mr. Keith does not render the controversy moot with regard to Mrs. Keith. The complaint in this case alleges that Mrs. Keith suffers irreparable harm as a result of the denial of her husband's Medicaid

application. Aplt's App. at 12-13. The harm she suffers is continuing, present and adverse in two different ways. First, under Colorado state law, Mrs. Keith remains liable for the payment of her husband's unpaid medical bills, notwithstanding his death. Colo. Rev. Stat. § 14-6-110. One's secondary liability for a deceased spouse's medical bills grants one a ". . . sufficiently concrete interest in [Medicaid] benefits . . ." to grant her standing to enforce rights guaranteed under Medicaid law. *Banks v. Secretary of Indiana Family & Social Services,* 997 F.2d 231, 238 (7th Cir. 1993). Once the surviving spouse's liability for medical bills is established, she "qualifies as a beneficiary of the [Medicaid] regulations and has shown that she was adversely affected [by the alleged illegal conduct]." *Id.* at 240.

The second way in which she is presently adversely affected by the denial of her husband's Medicaid application is that she is deprived of an allocation of marital and non-marital assets owned by the couple which would have been granted her free of liability for her husband's medical bills incurred during his Medicaid eligibility, had his application for Medicaid been properly evaluated. This allocation is accorded her by the Social Security Act [42 U.S.C. § 1396r-5(c)(2)(B)] and is referred to as the "Community Spouse Resource Allowance." *Id.* at § 1396r-5(f)(2). Essentially, these statutes provide that all of the couple's resources as of a certain date are determined, and all, or a portion of those resources may be retained by a non-institutionalized spouse without adverse effect on the institutionalized spouse's eligibility for Medicaid benefits. *Id.* at § 1396r-5(c)(2)(B). Significantly, Congress has granted spouses such as Mrs. Keith a right to a fair hearing identical to that granted direct Medicaid beneficiaries if the spouse is dissatisfied with the

allocation of assets between the couple by the Medicaid program. Thus, Mrs. Keith has a substantive right to having Medicaid eligibility established for her husband, that remains to vindicated.

Clearly, Mrs. Keith is an intended beneficiary of the Medicaid program, and suffers harm because of the illegal actions of the Respondent. The harm she suffers is in the form of her loss of funds which would have been retained by her in the form of her Community Spouse Resource Allowance, and in her continuing liability for medical bills arising out of her husband's illness. The harm is concrete, continuing and substantial. Thus, the "continuing, present adverse effects . . ." of the denial of her husband's Medicaid eligibility, required by this Court in *O'Shea v. Littleton*, 414 U.S. 488 (1974), for satisfaction of the case or controversy requirement of Article III, are present. *Id.* at 495-6.

In any event, if this case were determined to be moot by this Court, the proper procedure is to reverse or vacate the judgment below, and remand with a direction to dismiss. Such a procedure, ". . . eliminates a judgment, review of which was prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED MAY 15, 2000

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 99-1560

RODNEY H. KEITH, as representative Plaintiff for CLANCY WAYNE KEITH and SHIRLEY H. KEITH,

Plaintiffs – Appellants,

v.

JAMES T. RIZZUTO, Executive Director, Colorado Department of Health Care Policy and Financing,

Defendant – Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 99-M-1673)

* * *

Before **TACHA**, **BALDOCK**, and **BRORBY**, Circuit Judges.

TACHA, Circuit Judge.

Appellant Rodney Keith, representing his parents Clancy and Shirley Keith, appeals from the district court's order dismissing his claim. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

Appendix A

I.

Clancy Keith, a retiree, resides in a Colorado community care facility. He suffers from dementia associated with Alzheimer's disease and is expected to require extensive care for the remainder of his life. Mr. and Mrs. Keith subsist solely on Mr. Keith's income, which consists of a civil service pension of $4800 gross ($3868.73 net) per month and a Veteran's Administration pension of $67 per month.

In April 1999, Mr. Keith applied for Medicaid benefits from the Mesa County Department of Social Services ("Department"). Shortly thereafter, he executed an income trust in order to prevent his pension income from disqualifying him from Medicaid eligibility.[1] The Department denied Mr. Keith's application for Medicaid benefits pursuant to a regulation promulgated under Colo. Rev. Stat. §§ 15-14-409.7 and 38-10-111.5 by appellee Rizzuto's department.[2] These provisions mandate that only those individuals whose monthly incomes fall short of the average cost of nursing home care in the regions where they

---

1. An income trust consists of its settlor's unearned income. Colo. Rev. Stat. Ann. § 15-14-409.7(3)(a). All funds remaining in the trust upon the settlor's death must be used to compensate the settlor's state Medicaid program up to the amount that the program has expended on the settlor's behalf. *Id.* § 15-14-409.7(3)(b). The Medicaid Act permits states to ignore such trusts in determining an applicant's Medicaid eligibility. *See* 42 U.S.C. § 1396p(d).

2. *See* 10 Colo. Code Regs. § 2505-10, 8.110.52, B, 2, b, 1. The regulation implements the statutory requirements described below in substantially the same terms as the statutes themselves.

reside may establish valid income trusts. In Mr. Keith's region, the average cost of nursing home care was $3034 per month. Because Mr. Keith's income exceeded this rate, the Department determined that his income trust was invalid under Colorado law, and that he therefore was ineligible for Medicaid.

Appellant filed suit for declaratory and injunctive relief under 42 U.S.C. § 1983, arguing that Colorado law violates the federal guidelines for creation of a valid income trust. Appellee filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). The district court granted the motion, finding that federal law does not require states to recognize income trusts at all and thus that states are free to place limits or conditions upon the recognition of such trusts.

II.

We review a 12(b)(6) dismissal de novo. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). We accept all well pled allegations in the complaint as true and view them in the light most favorable to the nonmoving party. *Id.* "A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation marks and citation omitted).

Colorado has elected to participate in the Medicaid program through enactment of the Colorado Medical Assistance Act, Colo. Rev. Stat. Ann. §§ 26-4-101 to -904. To receive federal Medicaid dollars, Colorado must provide

specified medical services to certain classes of citizens through its state Medicaid plan. *See* 42 U.S.C. §§ 1396 and 1396a(a)(10)(A)(i). Mr. Keith does not fall within any of these classes. However, a state may opt to cover additional individuals, such as Mr. Keith, who remain in medical institutions for periods in excess of 30 days, provided that these persons' incomes do not exceed a federally specified ceiling. *Id.* § 1396a(a)(10)(A)(ii)(V). Colorado has elected conditionally to cover such individuals through enactment of Colo. Rev. Stat. Ann. § 26-4-301(1)(g).

42 U.S.C. § 1396a(a)(18) requires that state Medicaid plans comply with 42 U.S.C. § 1396p. Section 1396p(d) lays out the federal rules governing how trusts should be counted in determining an individual's income-eligibility for Medicaid. If an individual who establishes a trust is able to revoke or benefit from the trust, then the trust's corpus and payments must be counted respectively as resources available and income accruing to that individual. *Id.* § 1396p(d)(3). However, these rules do not apply to the following:

> (B) A trust *established in a State* for the benefit of an individual if —
>
> (i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),
>
> (ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total

> medical assistance paid on behalf of the individual . . . , and
>
> (iii) the State makes medical assistance available to individuals [pursuant to the optional extended care program allowed under 42 U.S.C. § 1396a(a)(10)(A)(ii)(V)].

Id. § 1396p(d)(4)(B) (emphasis added). Thus, § 1396p(d) does not apply to income trusts.

Appellant contends that, since Colorado elected to provide optional Medicaid coverage for nursing home care and to recognize income trusts for purposes of determining eligibility for such coverage, it is barred from conditioning that recognition on the amount of a settlor's income. In support of this contention, he argues first that § 1396p(d)(3) "allows" states to count trust income and assets in determining Medicaid eligibility. Since § 1396p(d)(4) exempts income trusts from § 1396p(d)(3), appellant concludes that states are not allowed to count income trusts in determining Medicaid eligibility.

Appellant's argument misapprehends the mandatory force of § 1396p(d)(3). Section 1396p(d)(3) does not merely "allow" states to count trusts in determining Medicaid eligibility; it *requires* them to do so.[3] Section 1396p(d)(4)

---

3. Section 1396p(d)(3) provides that the corpus of a trust "shall be considered resources available to the individual," and that payments from the trust "shall be considered income of the individual." "It is a basic canon of statutory construction that use of the word 'shall' indicates a mandatory intent." *United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997).

therefore provides an exception to a requirement. States accordingly need not count income trusts for eligibility purposes, but nevertheless may, like Colorado, opt to do so. Appellant's first argument is therefore without merit.

Appellant next argues that Colorado law is invalid under the doctrine of conflict preemption. Congress may preempt state law under the Supremacy Clause, U.S. Const. art. VI, cl. 2. *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1189-90 (10th Cir. 1999). Conflict preemption "occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal indentation and citation omitted).

Appellant claims that it is impossible for Mr. Keith to comply with both federal and state law because Mr. Keith complied with 42 U.S.C. § 1396p(d), but cannot possibly comply with Colo. Rev. Stat. Ann. § 15-14-409.7. This claim is without merit. The fact that it is possible to comply with one law while failing to comply with another does not render compliance with both impossible. To the contrary, anyone who, unlike Mr. Keith, receives monthly pension income less than the average monthly cost of nursing home care in his region will meet the eligibility standards of both federal and Colorado law.

In addition, Colo. Rev. Stat. Ann. § 15-14-409.7 is not an obstacle to the accomplishment and execution of the purposes and objectives of Congress. There is a "strong

presumption that the legislative purpose is expressed by the ordinary meaning of the words used" in a statute. *Ardestani v. INS*, 502 U.S. 129, 136 (1991) (internal quotation marks and citation omitted). This presumption "is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed." *Id.* at 135-36 (internal quotation marks and citation omitted); *see also ABC Rentals of San Antonio, Inc. v. Commissioner*, 142 F.3d 1200, 1206-07 (10th Cir. 1998) ("If the language is clear, the inquiry is over.").

The legislative purpose behind § 1396 is clear from the language of the statute. Congress required that states generally count trust assets and income for purposes of determining Medicaid eligibility, but exempted income trusts from that requirement. Thus, Congress left the states free to decide whether and under what conditions to recognize such trusts. Appellant neither questions the clarity of § 1396p(d)'s language nor directs us to any indications of contrary intent. Thus, even accepting all allegations in appellant's complaint as true and viewing them in the light most favorable to him, we find that he can prove no set of facts in support of his claim which would entitle him to relief.

AFFIRMED.

APPENDIX B — EXCERPTS FROM TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO RE MOTION TO DISMISS DATED NOVEMBER 23, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

99 M 1673

RODNEY H. KEITH,

Plaintiff,

vs.

JAMES T. RIZZUTO, Executive Director, Colorado Department of Health Care Policy and Financing,

Defendant.

MOTION TO DISMISS
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U. S. District Judge for the District of Colorado, beginning at 2:00 p.m. on the 23rd day of November, 1999, in Courtroom A, United States Courthouse, Denver, Colorado.

* * *

Appendix B

[21] * * *

THE COURT: Okay. Well, I'm not persuaded. I'm going to follow the previous ruling and grant the motion to dismiss. I don't think there's any preemption here, and I don't think there's any invalidity to the state statute, and the effect of the state statute is that the income trust in this case is void and invalid. And, therefore, the rule doesn't — the federal rule doesn't apply here.

So this civil action is dismissed. Court's in recess.

* * * *

APPENDIX C — ORDER OF DISMISSAL AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED NOVEMBER 23, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Chief Judge Richard P. Matsch

Civil Action No. 99-M-1673

RODNEY H. KEITH, as representative Plaintiff for CLANCY WAYNE KEITH AND SHIRLEY H. KEITH,

Plaintiffs,

v.

JAMES T. RIZZUTO, Executive Director, Colorado Department of Health Care Policy and Financing, and TOM PAPIN, Executive Director, Mesa County Department of Social Services,

Defendants.

ORDER OF DISMISSAL

Pursuant to the oral argument held today, it is

ORDERED that the state defendant's motion to dismiss complaint is granted and the complaint and this civil action are dismissed.

Appendix C

DATED: November 23rd, 1999.

BY THE COURT:

s/ Richard P. Matsch
Richard P. Matsch, Chief Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-M-1673

RODNEY H. KEITH, as representative Plaintiff for CLANCY WAYNE KEITH AND SHIRLEY H. KEITH,

Plaintiffs,

v.

JAMES T. RIZZUTO, Executive Director, Colorado Department of Health Care Policy and Financing, and TOM PAPIN, Executive Director, Mesa County Department of Social Services,

Defendants.

JUDGMENT

Pursuant to the Order of Dismissal as to Defendant Tom Papin filed October 14, 1999, and the Order of Dismissal filed November 23, 1999, by Chief Judge Richard P. Matsch, it is

ORDERED AND ADJUDGED that the complaint and this action are dismissed.

Appendix C

Dated: *November 23, 1999*

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

By: s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 20, 2000

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 99-1560

RODNEY H. KEITH, as representative Plaintiff for Clancy Wayne Keith; SHIRLEY H. KEITH,

Plaintiff – Appellant,

v.

JAMES T. RIZZUTO, Executive Director, Colorado Department of Health Care Policy and Financing,

Defendant – Appellee.

ORDER

Filed June 20, 2000

Before **TACHA**, **BALDOCK** and **BRORBY** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the

panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: s/ Kathleen M. Fabrizio
Deputy Clerk

APPENDIX E — RELEVANT STATUTES

42 U.S.C. § 1396p

Sec. 1917(a) IMPOSITION OF LIEN AGAINST PROPERTY OF AN INDIVIDUAL ON ACCOUNT OF MEDICAL ASSISTANCE RENDERED TO HIM UNDER A STATE PLAN. —

* * *

(b) ADJUSTMENT OR RECOVERY OF MEDICAL ASSISTANCE CORRECTLY PAID UNDER A STATE PLAN —

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

* * *

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of —

* * *

(ii) at the option of the State, any items or services under the State plan.

* * *

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual —

* * *

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(c) TAKING INTO ACCOUNT CERTAIN TRANSFERS OF ASSETS.—

(1)(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the

look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

* * *

(C)(ii) The services described in this subparagraph with respect to a noninstitutionalized individual are services (not including any services described in clause (i)) that are described in paragraph (7), (22), or (24) of section 1396d(a) of this title, and, at the option of a State, other long-term care services for which medical assistance is otherwise available under the State plan to individuals requiring long-term care.

(E)(i) With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to —

* * *

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

Appendix E

(ii) With respect to a noninstitutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall not be greater than a number equal to —

* * *

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

* * *

(d) TREATMENT OF TRUST AMOUNTS. —

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to —

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

Appendix E

(3)(A) In the case of a revocable trust —

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust —

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income —

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

(B) A trust established in a State for the benefit of an individual if —

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(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter, and

(iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the

parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

* * * *

42 U.S.C. § 1396r-5(c)

Sec. 1924(c) RULES FOR TREATMENT OF RESOURCES. —

* * *

(2) ATTRIBUTION OF RESOURCES AT TIME OF INITIAL ELIGIBILITY DETERMINATION —

* * *

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) (as of the time of application for benefits).

* * * *

Appendix E

42 U.S.C. § 1396r-5(d)

Sec. 1924(d) PROTECTING INCOME FOR COMMUNITY SPOUSE.—

(1) ALLOWANCES TO BE OFFSET FROM INCOME OF INSTITUTIONAL SPOUSE.—After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

* * *

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

* * * *

Appendix E

Colo. Rev. Stat. 14-6-110

§ 14-6-110. Joint liability for family expenses. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

Colo. Rev. Stat. 15-14-409.7

§ 15-14-409.7. Income trusts — limitations.

(1) An income trust within the meaning of this section is a trust established for the benefit of an individual that consists only of pension income, social security, and other monthly income to the individual and accumulated income in the trust and that is established for the purpose or with the effect of establishing or maintaining income eligibility for certain medical assistance.

(2) An income trust shall not be effective for establishing or maintaining income eligibility for any category of public assistance other than nursing home care or home and community-based services.

(3) In order to establish or maintain income eligibility, an income trust shall meet all of the following criteria:

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(a) The assets used to fund the trust are limited to any monthly unearned income received by the applicant, including any pension payment;

(b) The sole lifetime beneficiaries of the trust are the person for whom the trust is established and the state medical assistance program. After the death of the person for whom the trust is created or after the trust is terminated during the beneficiary's lifetime, whichever occurs sooner, no person is entitled to payment from the remainder of the trust until the state medical assistance agency has been fully reimbursed for the assistance rendered to the person for whom the trust was created.

(c) The entire corpus of the trust, or as much of the corpus as may be distributed each month without violating federal requirements for federal financial participation, is distributed each month for expenses related to nursing home care or home and community-based services for the beneficiary that are approved under the state medical assistance program; except that an amount reasonably necessary to maintain the existence of the trust and to comply with federal requirements may be retained in the trust;

(d) The trust provides that deductions may be made from the monthly trust distribution to the same extent that deductions from the income of a nursing home resident or home and

community-based services client are allowed under the state medical assistance program, article 4 of title 26, C.R.S., for nursing home residents and home and community-based services clients who are not trust beneficiaries. Allowable deductions include the following:

(I) A monthly personal needs allowance;

(II) With respect to nursing home residents only, payments to the beneficiary's community spouse or dependent family members as provided and in accordance with Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396r-5, as amended, and section 26-4-506, C.R.S.;

(III) Specified health insurance costs and special medical services provided under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396a(r), as amended;

(IV) Any other deduction provided by rules of the medical services board, including rules concerning posteligibility treatment of income for home and community-based services clients;

(e) The trust provides that, upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner, the state agency administering the state medical assistance program receives all amounts remaining in the trust up to the total medical assistance paid on behalf of the individual;

(f) The applicant's monthly gross income from all sources, without reference to the trust, exceeds the income eligibility standard for medical assistance then in effect but is less than the average private pay rate for nursing home care for the geographic region in which the applicant lives.

Colo. Rev. Stat. 38-10-111.5

38-10-111.5 Trusts to establish or maintain eligibility for certain public assistance void exceptions. Any trust established by or for a person, that consists of the person's individual assets, income, or property of any kind, shall be void for the purpose of establishing or maintaining eligibility for any public assistance as provided by article 2 of title 26, C.R.S. or medical assistance as provided by article 4 of title 26, C.R.S., unless that trust is established in accordance with the provisions of sections 15-14-409.6 to 15-14-409.9, C.R.S.